IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

NO. 92-193

JACK MORGAN, WARDEN,

Petitioner,

v.

JAMES THOMAS JEFFERSON

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

JAN 18 1991

CLERK

JAMES THOMAS JEFFERSON	)	
	)	
Petitioner	)	
	)	
v.	)	No. 3:89-0382
	)	Judge Nixon
JACK MORGAN, Warden	)	
	)	
Respondent	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This petition for writ of habeas corpus was referred to the Magistrate by the Honorable John T. Nixon, District Judge, by Order entered July 18, 1989 (Docket Entry No. 2). Pursuant to 28 U.S.C. § 636(b)(1)(B), the Magistrate was directed to consider whether the claims in this action are frivolous or malicious within the meaning of 28 U.S.C. § 1915(d) and to conduct any necessary proceedings under Rule 72(b) of the Federal Rules of Civil Procedure. In essence, "[a] complaint . . . is frivolous where it lacks an arguable basis in law or in fact." Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). See also Rule 10, Rules Governing Section 2254 Cases.

The Magistrate found that the petition was not frivolous and directed the respondent to file a response (Docket Entry No. 3). Pending before the Court are the following motions: (1) petitioner's motion to reinstate the Court's earlier Findings of Fact and Conclusions of Law (Docket Entry No. 9); (2) respondent's motion to amend his answer (Docket Entry No. 13); and (3) petitioner's motion to strike the respondent's motion to amend (Docket Entry No. 14).

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This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 1-22-91 By

(17)

Petitioner, James Thomas Jefferson (Jefferson) seeks a writ of habeas corpus alleging violations of the Equal Protection Clause of the Fourteenth Amendment by the systematic exclusion of blacks from the state grand jury and petit jury that initiated and heard the state charges that led to his conviction of first degree murder (Docket Entry No. 1). In his motion, Jefferson moves to reinstate an earlier opinion of this Court that there was systematic exclusion of blacks from his grand juries in violation of the Equal Protection Clause. The Court's opinion was reversed by the Court of Appeals, but only because of Jefferson's failure to exhaust his state remedies (Docket Entry No. 9). Respondent Jack Morgan, Warden of the Tennessee State Penitentiary, does not object to consideration of the prior opinion, but contends that the Court should reconsider subsequent facts since that opinion (Docket Entry No. 10).

Respondent moves to amend his answer to assert that Rose v. Mitchell, 443 U.S. 545, 61 L.Ed.2d 739, 99 S.Ct. 2993 (1979) does not have retroactive effect on this case based upon the rule announced in Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989) (Docket Entry No. 13). In response, petitioner moves to strike respondent's motion to amend his answer as untimely under Local Rule 8 (Docket Entry No. 14). Respondent contends that Local Rule 8 is inapplicable or, in the alternative, that the Court should grant leave to amend (Docket Entry No. 16).

For the reasons set forth below, the Magistrate recommends that this Court's prior findings and conclusions in Jefferson v. Dutton, 607 F. Supp. 355 (M.D. Tenn. 1985) be reinstated in this case under the "Law of the Case" doctrine that courts will not redetermine issues resolved in earlier litigation absent a manifest injustice. The Court of Appeals in reversing the Court's prior judgment, did so only because petitioner had an unexhausted state claim and did not otherwise

disturb the Court's holding on the facts. Moreover, respondent has failed to demonstrate clear error in the Court's prior judgment. The Magistrate also recommends that respondent's motion to amend his answer be granted, because the arguments contained in the amendments may affect the disposition of this case and because leave to amend will not prejudice the petitioner. The Magistrate also recommends that petitioner's motion to strike be denied because respondent's motion is not bound by the time constraints of Local Rule 8(b)(3) in this habeas corpus proceeding.

II. REVIEW OF THE RECORD

Jefferson is a black citizen who was indicted by the Davidson County Grand Jury on July 23, 1968 for first degree murder. Jefferson v. Dutton, 607 F. Supp. 355, 357 (M.D. Tenn. 1985). The grand jury that indicted Jefferson had two black jurors with the other jurors and the foreperson being white. Id. at 358. The jury for Jefferson's first trial was made up of seven whites and five blacks. Id. at 357 n. 1. That trial ended in a hung jury. Id. at 357. Petitioner's second trial had a jury made up of ten whites and two blacks. Id. at 357 n. 2. This trial ended in petitioner's conviction and sentence of ninety-nine (99) years. Id. at 357. Jefferson appealed to the Tennessee Court of Criminal Appeals, which remanded the case for an evidentiary hearing on the systematic exclusion of blacks from petit and grand juries. Id. The Tennessee Supreme Court affirmed this decision to remand. Id.

Upon remand, the state trial court limited petitioner's proof to the composition of the grand jury that indicted him and the petit jury that convicted him. Id. The trial court concluded that there had been no systematic exclusion of blacks with respect to either jury. Id. In 1977, the Court of Criminal Appeals

affirmed this decision and the Tennessee Supreme Court denied permission to appeal. Id.

Jefferson then filed his petition in this Court. The Magistrate incorporates this Court's prior factual findings on Jefferson's first federal habeas corpus petition about racially discriminatory practices in the selection of grand jurors in Davidson County.

> The parties agree that petitioner has made out a prima facie case of racial discrimination in the selection of grand juries. As to the first element in the three-prong test in Castaneda, blacks are clearly a suspect category for purposes of equal protection analysis. Second, petitioner has satisfied the rule of exclusion. Evidence was presented that in the decade prior to petitioner's indictment (1958-1968), there were thirty-three (33) grand juries. Each grand jury was composed of thirteen members who were selected by criminal court judges in Davidson County. Of those thirty-three, seventeen grand juries had only one black member. Seven grand juries had no blacks, and the number of blacks on eight grand juries was unknown. There were two blacks on petitioner's grand jury. The black population of Davidson County was approximately nineteen percent during the period in question. All twenty-five of the grand juries, for which data is available, had a percentage of blacks that was significantly less than the percentage of the population of blacks in Davidson County. Thus, the Court concludes that petitioner has satisfied the rule of exclusion.
>
> Petitioner has also satisfied the third element of the Castaneda test by showing that the appointing judges under the keyman system were aware of the race of the grand jurors that they appointed. Such a procedure is clearly susceptible to abuse. [citing Rose]
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> • • •
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> In the case at bar, three grand juries were selected by the criminal court judges for Davidson County each year during the period from 1958 to 1968 using the keyman system. In 1971, three years after petitioner's indictment, the County changed to a system whereby both grand jurors and petit jurors were selected from computer-generated lists. During the decade in question, most of the jurors were appointed by the Honorable Raymond H. Leathers, who began serving in Division I of the Davidson County Criminal Court in 1958, and the Honorable John L. Draper, who began serving in Division II in October, 1960. These two judges appointed twelve jurors plus one foreman to each grand jury. Documented evidence as to the racial composition of the grand juries is available for all but five of the grand juries and all twenty-six foremen. All twenty-six of the foremen were white, and only fourteen of the 252 jurors were black. Petitioner introduced testimonial evidence as to five additional grand

juries and seven additional foremen. Of the total of thirty-three grand jury foremen, all were white. Of the twenty-six grand juries with a total of 312 non-foreman positions, no more than twenty (6.45%) were black.

The testimonies of Judge Draper and Judge Leathers deny any racial bias in the selection process. The evidence indicates that they depended on first-hand knowledge and referrals from friends and civic groups as the basis for recruiting grand jurors. Both judges used objective guidelines to select jurors; the juror characteristics sought included citizenship activities, maturity, work experience, standing in the community, and general qualities of good citizenship. Of primary concern to the Court, however, is not the criteria used to select actual grand jurors, but the pool from which those jurors were chosen. It is the judgment of the Court that the effect of the process by which the pool of potential jurors was formed was excessively weighted toward the white community and served to exclude potential black grand jurors. This conclusion is buttressed by the fact that all but one of the twenty-six juries had zero or one blacks and by the fact that not one of the thirty-three foremen selected was black. "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero...."

Jefferson v. Dutton, 607 F. Supp. at 358, 359, 360. (emphasis added).

This Court arrived at its conclusions on petitioner's claim under the test set forth by Castaneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977).

...[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. ... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

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This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. ... Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

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> Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda, 430 U.S. at 494-95. (emphasis added)

In a word, Castaneda holds that the systematic exclusion of a petitioner's group from a petitioner's grand jury may be shown by a substantial underrepresentation of that group over a significant period of time when the procedure for grand jury selection is open to such abuse.

For its conclusions of law, the Court found as to the first element of Castaneda, that Jefferson's group was clearly a suspect category "for purposes of equal protection analysis. Jefferson, 607 F. Supp. at 358. As to the second element of Castaneda, the Court's review involved evidence as to the composition of Davidson County grand juries from 1958 to 1968. Id. at 358. The state courts had only considered petitioner's grand jury and the percentage of the black population in Davidson County which was eligible for jury duty. See Jefferson v. State of Tennessee, 559 S.W.2d 649, 651 (Tenn. Cr. App.) cert. denied (Tenn. 1977). This Court, however, held that petitioner was entitled to submit proof as to the composition of grand juries for the ten years before his indictment. Jefferson, 607 F. Supp. at 358.

This Court held that the state courts' refusal to allow petitioner to present evidence on the composition of prior grand juries was a denial of the full, fair and adequate hearing required by 28 U.S.C. § 2254(d)(6) and the due process required by 28 U.S.C. § 2254(d)(7). Jefferson, 607 F.Supp. at 358. This holding relied upon Castaneda, which held that a petitioner could prove underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve ... over a significant period of time." Castaneda, 430 U.S. at 494. (emphasis added). The Court noted that "without

evidence of other grand juries, it would be virtually impossible to prove systematic exclusion. Jefferson, 607 F. Supp. at 358 n. 5.

In an unpublished opinion, the Court of Appeals for the Sixth Circuit remanded the case with instructions to dismiss the petition without prejudice. Jefferson v. Dutton, No. 85-5335 (6th Cir. June 10, 1986) at 6, attached to Docket Entry No. 8 as Addendum 15. The Court of Appeals held that the systematic exclusion of blacks as forepersons to these grand juries was a separate issue that had not been exhausted in the state courts. Id. at 4. Thus, the petition contained both exhausted and unexhausted claims which required its dismissal. Id.

After a remand, Jefferson's petition on this issue in the state court was denied by the Criminal Court for Davidson County, Tennessee, on September 11, 1987. (Docket Entry No. 1 at 4). The Tennessee Court of Criminal Appeals then affirmed the trial court. State v. Jefferson, 769 S.W.2d 875, 877 (Tenn. Cr. App. 1988) perm. to appeal denied (Tenn. 1989). It is significant to note here that in its affirmance, the Tennessee Court of Criminal Appeals took issue with the Supreme Court's findings as to the powers of a Tennessee grand jury foreperson in Rose v. Mitchell, 443 U.S. 545, 61 L.Ed.2d 739, 99 S.Ct. 2993 (1979). In Rose, the Supreme Court found that a foreperson on a Tennessee grand jury must endorse a grand jury indictment, or else the indictment would be "fatally defective." Rose, 443 U.S. at 548 n. 2. Later, citing Rose, the Supreme Court held in Hobby v. United States, 468 U.S. 339, 82 L.Ed.2d 260, 104 S.Ct. 3093 (1984), that a Tennessee grand jury foreperson had "virtual veto power over the indictment process." Hobby, 468 U.S. at 348.

The state courts objected to this conclusion that a grand jury foreperson in Tennessee has "'virtual veto power' over the grand jury as a whole." State v.

Jefferson, 769 S.W.2d 875, 877 (Tenn. Cr. App. 1988) perm. to appeal denied (Tenn. 1989). The state courts and the respondent insist that the foreperson's duties were "substantially ministerial and clerical in nature." Id. Since the grand jury foreperson has no greater power than any other juror, the state courts held, and the respondent argues that the systematic exclusion of black citizens from the position of foreperson does not state a separate equal protection claim. Id. at 878.

As to exclusion of blacks from the grand jury, the state courts found no equal protection claim because there was no statistical disparity between the number of black citizens eligible for jury duty and the number of black jurors on petitioner's grand jury.

> On the contrary, two permanent members of that jury were black, and a black alternate was available. The percentage of blacks to the total population eligible for jury duty was 15.4, not far from the average for the county. There was no substantial underrepresentation of his group on this grand jury. With the alternate considered, at times during that term 23 percent blacks were available for the grand jury. There is no substantial disparity here which would suggest any discriminatory purpose or that blacks had been systematically excluded from Davidson County grand juries.

Id. at 878 (quoting Jefferson v. State, 559 S.W.2d 649, 651-52 (Tenn. Cr. App.) cert. denied (Tenn. 1977). The Tennessee Supreme Court denied permission to appeal. State v. Jefferson, 769 S.W.2d at 875. Petitioner then filed his second petition with this Court on May 10, 1989 (Docket Entry No. 1).

III. CONCLUSIONS OF LAW

The pending motions present two issues before the Court; (1) whether the Court should reinstate its findings of fact on the first petition in its consideration of the second petition and (2) whether the Court should allow respondent to amend his answer as to argue that Rose v. Mitchell has no retroactive effect on the present petition. The Magistrate begins with the first issue.

In essence, petitioner asks this Court to treat its prior findings of fact and conclusions of law on his petition as the "law of the case." The doctrine of the "law of the case" holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). The court may reconsider a prior holding, however, "if convinced that it is clearly erroneous and would work a manifest injustice." Id. at 618 n. 8. Although the doctrine does not impose an absolute rule, its use comes from the understanding that "efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1988) at 118.

Whether a trial court's prior judgment is the "law of the case" after an appeal and remand depends upon the extent of the appeal and the issues actually decided by the appellate court.

> If an appeal is taken from only a part of the judgment, the remaining part is res judicata, and the vacation of the portion appealed from and remand of the case for further proceedings does not revive the trial court jurisdiction of the unappealed portion of the judgment. Thus the more flexible doctrine of the law of the case has no application. If the notice of appeal embraces the entire judgment and the judgment is reversed or vacated and the case remanded generally for further proceedings, such law as is established by the appellate court, explicitly or by necessary inference, must be applied by the district court. In the case in which the mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case, and on appeal from the judgment rendered after remand, it may be reviewed by the appellate court. It remains, however, that the issue was decided by the district court in an earlier case and was not disapproved by the appellate court. It is, therefore, the law of the case, but within the more flexible branch of the doctrine applicable to successive rulings of trial courts.

Id. at 131 (footnotes omitted). In essence, the trial court may apply the undisturbed portions of a prior judgment that has been appealed unless there is clear and convincing proof of error.

Here, the Court of Appeals reversed this Court's earlier judgment because petitioner had not exhausted his state remedies. Jefferson, No. 85-5335 at 6. In doing so, the Court of Appeals noted that "we do not feel it is necessary at this time to discuss the merits of his claim." Id. at 3 n. 7. Thus, the Court of Appeals left this Court's findings of fact undisturbed. Instead of conducting a renewed inquiry into these matters, this Court is free to reinstate its prior findings of fact.

In light of the length and complexity of this litigation, the interests of efficiency dictate that this Court reinstate its prior factual findings absent a manifest injustice. After petitioner's indictment in 1968, he immediately filed a plea of abatement alleging the systematic exclusion of blacks from Davidson County juries. Jefferson, 607 F.Supp. at 357. His claims in that first petition before the state courts were not finally denied until 1977. Id. Petitioner then filed his petition in the federal courts in 1982. Id. The claims in this petition have been before the courts in one form or another since that 1982 filing. There are no new facts on the selection of grand juries presented. Rather, it is an argument of law that respondent advances.

Given the length of time which has already passed, there should be no unnecessary delay from repetitive fact finding. Absent a showing of clear error in this Court's previous factual inquiry, the results of that evidentiary review should be reinstated. Thus, the Magistrate recommends that the Court reinstate its findings of fact on the composition of Davidson County grand juries.

As to the legal conclusions from these factual findings, respondent objects to the Court's prior legal conclusions. (Docket Entry No. 10 at 2). Respondent argues, in essence, that the Court should adopt the state courts' conclusions that the Supreme Court erred in Rose and Hobby. The Magistrate notes that the prior judgment of this Court was not decided upon Rose or Hobby. In fact, the Court's view of the grand jury foreperson claim was similar to the view of the state courts. See Jefferson, 607 F. Supp. at 357 n. 4. In any event, the powers of a Tennessee grand jury foreperson were not essential to this Court's prior holding. The Court's prior holding was an analysis under Castaneda of the process by which Tennessee selected all grand jurors. The Court found that a system in which judges appointing grand jurors were aware of the jurors' race was "clearly susceptible to abuse." Jefferson, 607 F.Supp. at 358. Although Rose v. Mitchell was cited in support of this proposition, the Supreme Court's conclusions in Rose and Hobby buttress this Court's earlier independent finding.[1]

The Court's determination that racial discrimination had impermissibly tainted petitioner's grand jury was based upon the statistical disparity between the number of black grand jurors in the ten years preceding petitioner's indictment and the black population in Davidson County. Id. at 360. As previously noted, Castaneda requires the consideration of grand jury composition "over a significant period of time," not just the racial composition of the grand jury that indicted Jefferson. 430 U.S. at 494. The absence of black forepersons on the grand juries during that period was only one fact supporting the Court's determination. 607 F. Supp. at 360. More important to that determination, however, was the fact

[1]Of course, this Court has no power to overrule the Supreme Court's conclusion in Rose v. Mitchell, even if it believed that the state courts' view was correct.

that all except one of the grand juries considered had only one or no black members. Id.

The virtual absence of black grand jurors, compared to the black population of Davidson County, presented a statistical disparity which itself was part of the proof of systematic exclusion.

> The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.

Castaneda, 430 U.S. at 494 n. 13. Castaneda remains the relevant analysis for a claim that a suspect class has been systematically excluded from a grand jury. See Ford v. Seabold, 841 F.2d 677 (6th Cir.) reh'g denied en banc (6th Cir.) cert. denied 488 U.S. 928, 102 L.Ed.2d 334, 109 S.Ct. 315 (1988). Respondent has not articulated any other applicable analysis. Therefore, the Magistrate finds no clear error in the Court's prior judgment.[2]

Finally, the Tennessee courts found and the respondent argues that because two blacks were on the grand jury, that there is no violation of the Equal Protection clause. The long-standing federal rule, however, is to the contrary.

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[2]The Court of Appeals for the Sixth Circuit has held that the absence of a suspect class did not establish a prima facie case of discrimination. Ford, 841 F.2d at 681. In so holding, the Court of Appeals relied on Carter v. Greene County, 396 U.S. 320, 24 L.Ed.2d 549, 90 S.Ct. 518 (1970). Ford, 841 F.2d at 686. The Magistrate, however, believes that Ford is distinguishable. The Court in Ford repeatedly emphasized that at issue there was a Sixth Amendment claim to a jury from a fair cross section of the community, whereas, Castaneda involved an equal protection claim of intentional discrimination. Id. at 683 n. 4 and 684 n. 5. Finally, to the extent that Castaneda was cited on three elements that involve the question of intent, the statistical disparity here is far greater than the statistical disparity in Ford. More specifically, unlike the case here, the petitioner in Ford "points to nothing in the selection process which makes it obvious that the underrepresentation was due to the system itself" and women and men were selected for jury panels using a key wheel. Id. at 685. This Court, however, found that an appointing judge's awareness of a juror's race made the system "susceptible to abuse," in accordance with the Castaneda requirement. Jefferson, 607 F. Supp. at 358.

As Judge Learned Hand stated in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951):

> • • • • [W]e will assume that any party to a suit, civil or criminal, is entitled to "have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain even though he has not shown that the imbalance has prejudiced him. The question therefore becomes whether the grand panel and the petit panel which respectively found the indictment and tried the case were drawn from an unlawful list."

Dennis, 183 F.2d at 216.

The Dennis rule was affirmed by the Supreme Court. As one District Court succinctly stated: "It is not necessary for defendants to show that they are members of an excluded group or that the alleged imbalance actually prejudiced them." United States v. Bryant, 291 F.Supp. 542, 547 (D. Maine 1968) (emphasis added). The Dennis rule continues to be applied by federal courts. United States v. Donohue, 574 F. Supp. 1269, 1278 (D. Md. 1983); United States v. Guzman, 337 F. Supp. 140, 142 (S.D. N.Y. 1972), aff'd. 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937, 93 S.Ct. 1397, 35 L.Ed.2d 602 (1973); United States v. Cohen, 275 F. Supp. 724, 739 (D. Md. 1967), aff'd on other grounds sub nom United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1978), cert. denied 394 U.S. 934, 89 S.Ct. 1209, 22 L.Ed.2d 465 (1969). The respondent has cited no authorities to the contrary. Absent such authority, there appears no reason to alter the Court's prior conclusions of law on this issue.

The Magistrate next considers whether respondent should be allowed to amend his answer so as to assert that Rose v. Mitchell has no retroactive effect upon this case. If the Court adopts the Magistrate's conclusions that the Court's prior findings considered as a whole focused on the discriminatory racial selection of grand jurors, with the selection of the foreman as only one aspect of that unlawful selection process, then respondent's arguments based on Rose v. Mitchell are unnecessary. Nevertheless, the Court may permit a party to amend its

pleadings "when justice so requires." Fed. R. Civ. P. 15(a). If the Court finds that Rose v. Mitchell was essential to its prior holding and was erroneously decided by the Supreme Court, then petitioner failed to make a prima facie case. If so, then the burden of proof would not have been shifted to respondent to rebut petitioner's claim. In that event, the Court might never have granted the writ. If respondent's arguments might have affected the prior disposition, then they might affect the Court's current consideration. Justice may so require the Court to allow respondent to assert a meritorious defense, so long as there is no prejudice to petitioner.

Although respondent's motion to amend his pleadings comes long after petitioner's initial filing, the Magistrate notes that there is no trial date set or pending motion for summary judgment. Thus, petitioner has time in which to respond to these amendments. Moreover, Rule 15(a), Fed. R. Civ. P., appears to allow the Court to grant respondent's motion to amend at any time. Local Rule 8, cited by petitioner in opposition, only limits the time in which a party may respond to a motion but does not bar a motion to amend an answer. Local Rule 8(b)(3).[3] Therefore, the Magistrate finds that leave to amend should be granted. Finally, the Magistrate recommends that the Court adopt all prior findings of fact and conclusions of law that the respondent does not contest.

IV. RECOMMENDATIONS

The Magistrate recommends that petitioner's motion to reinstate this Court's earlier findings be granted. The Magistrate also recommends that respondent's motion to amend his answer be granted and petitioner's motion to strike be denied. Under Rule 8(b)(3) of the Rules Governing Section 2254 Cases, any party

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[3]The Magistrate notes that petitioner cites no specific language which bars respondent's motion to amend his answer. See Docket Entry No. 15.

has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111 (1986).

Entered this the 18th day of January, 1991.

WILLIAM J. HAYNES, JR.
United States Magistrate